

**REMARKS**

Claims 1, 4, 7, 9-11, 13, 16, 19, and 21-23 remain pending in this application. In the Office Action dated April 14, 2009, the Examiner took the following actions<sup>1</sup>:

- a. rejected claims 1, 4, 7, 9-11, 13, 16, 19, and 21-23 under 35 U.S.C. §101 as being directed towards nonstatutory subject matter;
- b. rejected claims 1, 4, 7, 13, 16, and 19 under 35 U.S.C. §103(a) as being unpatentable over U.S. Patent Publication No. 2003/0130883 to Schroeder et al. ("Schroeder"); and
- c. rejected claims 9-11 and 21-23 under 35 U.S.C. §103(a) as being unpatentable over *Schroeder* in view of U.S. Patent Publication No. 2002/0143604 to Cox et al. ("Cox").

Claims 1 and 13 have been amended.<sup>2</sup> No new matter had been added.

On Wednesday, June 26, 2009, the Examiner and Applicants' representative met for an interview to discuss this application. Topics of discussion included the pending claims in the case, U.S. Patent Application Publication No. US 2003/0130883 (*Schroeder et al.*), the pending rejections under 35 U.S.C. § 101, and the Examiner's taking of official notice of an allegedly well-known fact in the Office Action. The applicants would like to thank the Examiner for his hospitality during the interview.

**(a) Rejection of claims 1, 4, 7, 9-11, 13, 16, 19, and 21-23 under § 101**

Claims 1, 4, 7, 9-11, 13, 16, 19, and 21-23 have been rejected under 35 U.S.C. §101 as allegedly being directed to non-statutory subject matter. Although Applicants

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<sup>1</sup> The Office Action may contain a number of statements reflecting characterizations of the related art and claims. Regardless of whether any such statement is identified herein, Applicant declines to automatically subscribe to any statement or characterization in the Office Action.

<sup>2</sup> Claims were amended solely to expedite prosecution. Applicant preserves the right to pursue the original subject matter in subsequent applications.

maintain that the claims as filed fall squarely within the scope of section 101, Applicants have amended the independent claims in order to conform to current USPTO practice and to advance prosecution.<sup>3</sup>

**(b) Rejection of claims 1, 4, 7, 13, 16, and 19 under § 103(a)**

In rejecting independent claims 1 and 13, the Examiner took official notice that it was allegedly "well known to those of ordinary skill in the art, at the time of the invention, to calculate and display percent errors between forecasted data and actual data when evaluating the predictive capacity of a particular model." Office Action of April 14, 2009, p. 7. Official notice "should only be taken ... where the facts asserted to be well-known ... are capable of instant and unquestionable demonstration of being well-known." MPEP § 2144.03 (A).

Applicant respectfully traverses the taking of official notice. The Examiner's statement is not "capable of instant and unquestionable demonstration of being well-known." As an initial matter, the Examiner stated that "Schroeder in fact discloses the comparison of forecasted and actual data but does not explicitly calculate percentages between the two." Office Action of April 14, 2009, p. 7. Applicant notes that although the Examiner did not mention the "displaying" aspect of claims 1 and 13 in this sentence, the "displaying" aspect is part of the alleged fact of which the Examiner has taken official notice.

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<sup>3</sup> The amendments are supported, either explicitly or inherently, by disclosure in the specification disclosing a computer with a display (a computer screen). See, e.g., ¶ 22 and Figure 3.

Applicant does not consider the noticed fact to be well-known in the art at the time of the Applicant's invention. First, the noticed fact appears to involve the application of impermissible hindsight, as the invention date for Applicant's invention is at least as early as January 29, 2004, more than five years ago. Applicant therefore, under MPEP § 2144.03 (C), shifts the burden back to the Examiner by traversing the Examiner's official notice of the alleged fact.<sup>4</sup>

Second, the alleged noticed fact is not so well-known as to be universally applied. For instance, calculating and displaying percent error between forecasted customer demand and actual customer demand is not the only way to compare forecasted customer demand and actual customer demand. For example, Figure 3 of Applicant's specification shows an alternative visual comparison of these values using line and bar graphs.

Therefore, if the rejection is to be maintained, Applicant respectfully requests that Examiner produce authority for the statement in the next Office Action. MPEP § 2144.03 (C). If such authority is produced, Applicant will address it. Until then, Applicant maintains that claims 1 and 13 are allowable over the prior art.

Additionally, *Schroeder* does not contemplate any display that indicates differences between predicted and actual data. Rather, *Schroeder* only discloses displaying predicted data (see claims 33, 43), and in fact teaches

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<sup>4</sup> During the interview between Applicant's representative and the Examiner on June 24, 2009, the Examiner offered to find and present prior art teaching the allegedly well-known fact if the Applicant traversed the Examiner's taking of official notice.

away from displaying either actual data or percent error because actual sales data is used in *Schroeder* to "repeatedly refine the prediction model by comparing predicted data with actual data . . ." ¶78. Because "refin[ing]" is not something that is ordinarily done visually, integrating the alleged noticed fact into *Schroeder* is not appropriate in view of the purposes of *Schroeder*.

Dependent claims 4, 7, 16, and 19 were rejected based on *Schroeder* as well. Since these are all dependent claims that incorporate the individual claim elements of claims 1 and 13, these dependent claims all recite claim elements not disclosed in *Schroeder* or in any art of record. Accordingly, the rejection of claims 4 and 13 under 35 U.S.C. 103(a) should be withdrawn at least for the reasons given above with respect to claims 1 and 13.

**(c) Rejection of claims 9-11 and 21-23 under § 103(a)**

Dependent claims 9-11 and 21-23 were rejected based on *Schroeder* in view of Cox. Since these are all dependent claims that incorporate the individual claim elements of claims 1 and 13, these dependent claims all recite claim elements not disclosed in *Schroeder*, Cox, or any art of record. Accordingly, the rejection of claims 9-11 and 21-23 under 35 U.S.C. 103(a) should be withdrawn at least for the reasons given above with respect to claims 1 and 13.

As a final matter, the Office Action contained a paragraph at the outset that purports to respond to "Applicant's arguments filed on July 31, 2008,"

alleging that certain features of Applicant's invention are not recited in the rejected claims. Applicant does not understand this statement, as it did not file arguments on July 31, 2008. It further appears that the December 5, 2008 amendments submitted by Applicant explicitly included the features recited by the Examiner and the Examiner appears to have entered those amendments. Applicant therefore assumes the paragraph was erroneously included, but requests that the Examiner contact its representative if such an assumption is not correct.

In view of the foregoing amendments and remarks, Applicant respectfully requests reconsideration and reexamination of this application and the timely allowance of the pending claims.

Please grant any extensions of time required to enter this response and charge any additional required fees to our deposit account 06-0916.

Respectfully submitted,

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